IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL. - Petitioners

versus

ELIZABETH JANE HALL - - - Respondent

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals is recorded at p. 493 F. 2d 1211 and is reproduced at pp. 7(a)-10(a) in Appendix B of the Petition for Certiorari. *Jurisdiction* of this Court is invoked under 28 USC 1254(1).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The Anti-Injunction Act (Section 7421(a)) of the Internal Revenue Code of 1954 bars a suit in any Court by any person to restrain the assessment or collection of any tax, except where the Commissioner does

not send a deficiency notice to the taxpayer as he is required to do under Section 6212(a) and Section 6861(b). If a taxpayer's taxable year is terminated under Section 6851(a) which is entitled "Income Tax and Jeopardy" is the taxpayer entitled to a deficiency notice?

2. Does IRS violate the Fifth Amendment rights of a taxpayer when it terminates the taxpayer's taxable year, seizes the taxpayer's property, and puts it up for sale without giving the taxpayer an opportunity for a judicial determination of the vadility of the tax?

STATUTES INVOLVED

All pertinent statutes appear in Appendix A of the Petitioner's Brief.

STATEMENT OF THE CASE

On June 17, 1971, the President of the United States, Richard M. Nixon, announced the Administration would expand its efforts to combat the menace of drug abuse. The Internal Revenue Service was the agency President Nixon selected to aid in the war on drugs. Page 1 of the appendix to this Brief contains a photocopy of an actual page of the Internal Revenue Service Manual which was designed to implement the President's orders. Page 2 of the appendix to this Brief contains a sample letter that was sent to all Regional Directors of IRS to use in this implementation. The appended letter is substantially the same as the letter that was delivered on February 1, 1972, to the Respondent, Elizabeth Jane Hall. A copy of the letter

that was delivered to Mrs. Hall is found at p. 11 of the appendix to the Court (hereinafter referred to as App. Ct.). The instructions set out in the IRS Manual indicate tax collection efforts of IRS should be directed against those individuals who are suspected of trafficking in drugs and collection should be vigorous (Paragraph 2, p. 1 Appendix to this Brief). With the sending of this Manual supplement to the Regional Directors, the spring-loaded trap was set and all that was needed was a victim to step into it.

The trap set by IRS started closing around Jane Hall when her husband, Sterling Hall, was arrested in Brownsville, Texas, convicted and sentenced under the Young Adult Offenders Act for trafficking in marijuana. Following the confinement of Mr. Hall, Lieutenant Donald Powers, a Kentucky State Trooper, who apparently believed that Mrs. Hall must necessarily be involved in her husband's illegal activities, obtained a Search Warrant on January 31, 1973, and along with approximately ten State Troopers proceeded to Respondent's home, presented the Search Warrant and thoroughly searched the premises. The search produced a minuscule quantity of drugs.

These drugs were found in obscure places in Mrs. Hall's home and she has consistently stated the drugs were the property of her husband and she did not know these drugs were in her home. After the search was completed, Powers arrested Mrs. Hall and charged her with trafficking in marijuana. Respondent alleges that Powers was disappointed when his search produced only a minuscule quantity of drugs, and there-

fore he decided to take further punitive action against Mrs. Hall by proceeding to the Regional Office of IRS and advising the Director that he had discovered a drug pusher in the person of Elizabeth Jane Hall.

Acting on this information which was totally erroneous, and without further investigation, agents of the Internal Revenue Service proceeded to the home of Mrs. Hall on the following day (February 1, 1973) and handed her a letter stating that she owed IRS $52,680.25 in taxes for the period commencing January 1, 1973, and ending January 31, 1973. This incredible tax bill, according to IRS, was for the income she received from the sale of drugs during this thirty-one day period.

Mrs. Hall was astonished when the IRS agent demanded on-the-spot payment. When she advised him she did not have the money, the agent proceeded to attach her property and to tow-off her automobile. The Agent also advised her that he would return shortly to confiscate her personal property including her clothing. In paragraph 6 of the complaint filed in the United States District Court, the Respondent alleges the Internal Revenue Service threatened to take property of hers that was specifically exempt from levy under Section 6334 of the Internal Revenue Code of 1954 (App. Ct., p. 4). Interestingly enough, the Government in its answer to the Plaintiff's Complaint does not deny the IRS agent threatened to take exempt property, instead the Government claims they are "without knowledge or information sufficient to

form a belief as to the allegations of fact contained in paragraph 6 of the Complaint" (App. Ct., p. 23).

Shortly thereafter a notice was given by IRS that Mrs. Hall's car would be sold at public auction. When Mrs. Hall was notified her assets would be sold she was literally helpless. IRS had not sent her a deficiency notice which is a jurisdictional prerequisite to filing a suit in Tax Court. Her total assets were insignificant compared to the amount of the tax bill, therefore, she could not pay the assessment and file a refund suit in the District Court under the full payment rule of *Flora* v. *United States,* 362 U. S. 145 (1960). Because IRS had taken all of her assets, there was no way for her to post an adequate bond. Thus, Mrs. Hall took the only alternative available to her and filed suit in the United States District Court and asked that Internal Revenue Service be enjoined from selling her property.

Because the conduct of the IRS agents and Lieutenant Powers was so outrageous, the United States District Court not only enjoined the sale of Mrs. Hall's property, but the Court also enjoined these individuals from trespassing on her property and from harassing her or intimidating her in any manner. (A copy of the Preliminary Injunction may be found at page 5A of the government's petition for certiorari.)

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Because the conduct of the IRS agents and Lieutenant Powers was so outrageous, the United States District Court not only enjoined the sale of Mrs. Hall's property, but the Court also enjoined these individuals from trespassing on her property and from harassing her or intimidating her in any manner. (A copy of the Preliminary Injunction may be found at page 5A of the government's petition for certiorari.)

SUMMARY OF ARGUMENT

In the enforcement of the laws of the United States all other government law enforcement agencies must operate within the framework of the United States Constitution. Internal Revenue Service has been given enormous power by Congress to collect taxes that are due and owing to the United States and so long as IRS is operating under the guise that they are collecting taxes, IRS contends it has carte blanche. The Respondent disagrees.

At the same time the Government was trapping Mrs. Hall and other persons similarly situated, the Government was also trapping itself. IRS rushed head-on into the war on drugs and did not stop to formulate in advance any legal explanation for its conduct. The thinly veiled excuse that it was collecting taxes has evaporated under the barrage of suits filed throughout the Country. The Government has floundered in its attempt to justify its actions and from time to time and from Court to Court has changed its legal arguments in an attempt to legalize the actions of IRS.

In order for the Petitioner to prevail the requirements of Section 6212 which provides for the sending of a deficiency notice must be circumvented. In order to avoid the mandate of this section, IRS originally argued the authority for the Secretary to assess taxes was inherent in Section 6851 and because this section did not require the sending of a deficiency notice, IRS was permitted to assess and collect taxes without sending a notice to the taxpayer. *Schreck* v. *United States*, 301 F. Supp. 1265 (D. Md. 1969).

Apparently recognizing this argument was without merit, IRS then changed its position and argued that Section 6201 provides the Secretary an alternative method of assessing taxes and because this section contains no reference to a deficiency notice the Government can assess and collect taxes without sending the notice.

This argument was advanced in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973) and *Clark* v. *Campbell*, 501 F. 2d 108 (5th Cir. 1974), and in the case at bar.

The Respondent contends that when a deficiency exists, the Secretary must send notice to the taxpayer (Section 6212), and IRS cannot make any assessments until ninety (90) days after the notice is sent. During this ninety (90) day grace period, the taxpayer can petition Tax Court for a redetermination of the deficiency. However, the taxpayer cannot file the petition unless the deficiency notice is sent.

In the instant case, Mrs. Hall was denied the opportunity to litigate her claim in Tax Court because IRS arbitrarily decided not to send her the necessary notice. Because IRS failed to send the deficiency notice, it is the Respondent's position that the prohibitions contained in the Anti-Injunction Act are inapplicable. The Respondent also contends that when a taxable year is terminated in a jeopardy situation, the authority for IRS to assess taxes is contained in Section 6861, and the procedural safeguards of that section apply.

The Government has argued that Section 6201 provides the Secretary with the authority to assess taxes in a jeopardy situation, but the Respondent disagrees with this position and concedes that while Section 6201 does offer independent assessment authority, Section 6201 does not apply to jeopardy situations.

Finally, the Respondent will argue that if this case does not fall within any of the exceptions to the Anti-Injunction Act, the actions of IRS violate the United States Constitution.

ARGUMENT

I. WHEN IRS TERMINATES A TAXABLE YEAR IS THE AMOUNT DEMANDED BY IRS AN "IMPOSED TAX" AND IF THE TAXPAYER IS UNABLE TO PAY THE AMOUNT DEMANDED BY THE GOVERNMENT DOES THAT CREATE A DEFICIENCY WITHIN THE MEANING OF SECTION 6211?

These issues are important because if the amount demanded by the Government is not an imposed tax and no deficiency is created, then the taxpayer is not entitled to a deficiency notice.

A. What is an Imposed Tax?

1. When IRS Terminates a Taxable Year Under Section 6851 a Tax Is Imposed.

In answering these very important questions there has been a definite split of authority between the Circuit Courts. *Rambo* v. *United States,* 492 F. 2d 1060 (6 Cir. 1974), held the amount demanded by the Government was an imposed tax and if the taxpayer could not pay the bill, a deficiency was created. The same result was reached in *Clark* v. *Campbell,* 501 F. 2d 108 (5 Cir. 1974).

However, Respondent acknowledges there is authority to support the opposite view and the strongest case in the Government's arsenal is *Irving* v. *Gray,* 479 F. 2d 20 (2 Cir. 1974), wherein the Court cited as authority the case of *Williamson* v. *United States,* 31 Am. Fed. Tax R. 2d 75-800 (7 Cir. 1971) and *Ludwig Littauer & Co.* v. *Commissioner,* 37 B.T.A. 840 (1938).

The *Littauer* case provided the genesis for the idea that when a termination occurred under Section 250(g) (the predecessor to 6851) the amount claimed by the Government was not a tax imposed but only "a provisional statement of the amount which must be presently paid as a protection against the impossibility of collection"[1] (Littauer, p. 842). Thus, the *Littauer* Court created the theory that the IRS was not imposing a tax when a taxable year was terminated under Section 6851.

In *Williamson* the Court cited *Littauer* as controlling and held at p. 73-800:

---

[1] A careful reading of this case (Littauer) reveals this statement to be merely dictum. The issue of what is an imposed tax was not before the Court. The issue considered by the Court was whether a deficiency notice is a jurisdictional prerequisite to filing a suit in Tax Court. The Court sustained the Government's motion to dismiss because no deficiency notice had been sent to the taxpayer and, therefore, the suit was premature. However, what was once dictum in *Littauer* evolved through *Williamson* v. *United States,* 31 Am. Fed. Tax R. 2d 73-800 (7 Cir. 1971) and became case law in *Irving* v. *Gray,* 479 F. 2d 20 (2 Cir. 1974).

"The assessment in this case ***was not an imposed tax,*** but merely an amount which the IRS believed justified the termination of the taxable year." (Emphasis Added)

The Second Circuit in deciding *Irving* v. *Gray*, *supra*, 479 F. 2d 20 (2 Cir. 1974), used this exact quote from *Williamson* and concluded the IRS had not imposed a tax, and further no deficiency existed within the meaning of Section 6211. The Court concluded that a taxpayer whose year was terminated under Section 6851 was not entitled to a deficiency notice because no deficiency had been determined and, therefore, the taxpayers ". . . do not yet have the opportunity to petition the Tax Court" (*Irving* p. 24). The Court then concluded the taxpayer was not without a remedy because he could file a return and wait six months and sue for a refund (*Irving* p. 24).

The Respondent with due respect to the Second Circuit submits their conclusion that no tax was imposed is illogicial and not supported by either reason or law.

In the case at bar, the Government delivered a notice to Mrs. Hall stating her taxable year had been terminated. This notice may be found in its entirety at p. 11 of the appendix. However, to emphasise the point six lines from the Exhibit are quoted below:

". . . I declare the taxable period 1-1-73 through 1-30-73 immediately terminated and the income *tax* for such period immediately due and payable.

Any such *tax* in the following amount that is unpaid will be immediately assessed against you.

TAXABLE PERIOD	TAX	PENALTY
1-1-73 thru 1-30-73	$52,680.25	

Demand for immediate payment of the full amount of this *tax* is hereby made." (Emphasis Added)

It is obvious from the language of this letter that IRS thought it was imposing a tax at the time it terminated Mrs. Hall's taxable year, and now it seems ludicrous for the petitioner to argue otherwise.

Moreover, the *Irving* Opinion is internally inconsistent. After quoting that portion of the *Williamson* case which states the amount is not an imposed tax, two paragraphs later the Court states:

". . . they could have had their complaint of an overpayment heard in the District Court below if they had filed full-year returns reporting overpayments of *tax*" (p. 24). (Emphasis added.)

In order to uphold the IRS position, the Second Circuit adopted the semantical argument of the *Williamson* case, but in the final analysis the Court acknowledged reality and admitted that IRS had taxed the individual.

2. What If No Imposed Tax Has Been Imposed?

Respondent argues that it is obvious that IRS has imposed a tax and the preceding argument dramatically supports her position, but assuming *Williamson* v. *United States*, *supra*, 31 Am. Fed. Tax R. 2d 73-800 (7 Cir. 1971) is correct, the results are even more interesting.

If no tax has been imposed, the Respondent respectfully asks IRS to explain how they seized her property and under what authority they proposed to sell it? The relevant portion of Section 6331 which deals specifically with levies provides:

> "If any person liable to pay any *tax* neglects or refuses to pay the same. . . . it shall be lawful for the Secretary or his delegate to collect such *tax* . . . by levy upon all property belonging to such person . . ." (Emphasis Added)

From this provision it is clear the Director cannot seize Mrs. Hall's car on a whim. The only circumstance that warrants the seizure and sale of a taxpayer's property is when there are unpaid taxes due and owing to the United States. Thus, if the Second Circuit is correct and this is not an imposed tax the Respondent respectfully submits the Government has absolutely no right to seize her property because the Code does not allow for seizures under any circumstances unless they be made in connection with the collection of taxes.

Furthermore, the entire thrust of the Government's argument is that Mrs. Hall's suit is barred by Section 7421 of the Code, which is commonly called the Anti-Injunction Act. The relevant Section 7421 provides:

> ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court by any person . . ."

If the *Williamson* Court was correct, and only a "provisional amount" is seized when a taxable year is terminated, the Government instantly loses its case.

The Anti-Injunction Act provides the Government shall not be restrained from the assessment or collection of any tax, but Section 7421 does not prohibit an aggrieved taxpayer from filing suit to stop the Government from collecting a "provisional amount".

From this discussion it is obvious that IRS is imposing a tax, and Respondent submits that it would be self defeating for IRS to argue otherwise.

B. What is a Deficiency?

Interwoven with the issue of what constitutes an imposed tax is the issue of what is a deficiency within the meaning of Section 6211.

Section 6212 requires IRS to send a deficiency notice if the Secretary determines that there is a deficiency in respect to any tax imposed by Subtitle A (Income Taxes) or B or Chapter 42.

Section 6213 prevents IRS from selling the taxpayer's property until after the taxpayer has had an opportunity to file a petition in Tax Court for a redetermination of the deficiency.

In the case at bar, notwithstanding the fact that no deficiency notice was sent, IRS seized and put up for sale the assets of Mrs. Hall. In order to justify the action of IRS the Petitioner must establish that no deficiency was created when Mrs. Hall's taxable year was terminated.

Going back to *Williamson* v. *United States*, 31 Am. Fed. Tax P. 2, 73-800 (7 Cir. 1971), we find that Court holding an assessment made under Section 6851 is not

a deficiency as defined in Section 6211. This conclusion was reached because the Court did not believe the amount of money demanded by IRS was an imposed tax and further because no tax return had been filed, no deficiency was determinable (*Williamson* p. 73-800). Again the rationale of this decision was adopted by the Second Circuit in the *Irving* case. However, the conclusions of these two Courts cannot hold up under scrutiny.

The relevant Section of 6211 defines a deficiency as:

> ". . . the term 'deficiency' means the amount by which the tax imposed. . . . exceeds the excess of—
>
> 1. The sum of . . .
>
> a. The sum shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon."

This Section is expanded by Treasury Regulation 301.6211-1(a) which provides in part:

> "If *no return is made* or if the return . . . does not show any tax . . . the amount shown as the tax by the taxpayer upon his return shall be considered as zero. Accordingly, in any such case if no deficiencies . . . have been assessed or collected . . . the deficiency is the amount of *tax imposed* by Subtitle A, [Income Tax Title] Chapter 11, or Chapter 12." (Emphasis and Words in Brackets Added.)

From these definitions, it is clear that where a tax is imposed and no return is made the deficiency becomes the amount of the tax, and the government is placed in the untenable position of arguing against its own regulation.

Moreover, the question of what constitutes a deficiency has been thoroughly dissected in the case of *Clark* v. *Campbell*, 501 F. 2d 108 (5 Cir. 1974). In *Clark*, the specific argument was made by IRS that no deficiency existed following a short year termination under Section 6851. The Court rejected this argument and pointed out the defects in reasoning in the *Irving* case and held at p. 117:

> "Indeed Section 6211 in a very technical sense undertakes to define 'deficiency' 'if a return was made by the taxpayer' with no mention of that obvious class of underpayers who *do not file a return.*" (Emphasis Added)

After quoting Treasury Regulations 301.6211(a) *supra*, the *Clark* Court criticized the *Littauer* Opinion by illustrating Section 6851 "clearly provides that immediate tax liability has been imposed" (P. 118).

The Fifth Circuit then cited *Schreck* v. *United States*, *supra*, which is the landmark decision in this area and held there was no distinction between the deficiency created in the instant case and the deficiency created by definition in Section 6211. The Court held at p. 120:

> "We see no significant distinction nor any need for one. Since the tax liability which becomes im-

mediately due and payable following a Section 6851 quick termination fits within the codal definition of deficiency, . . ."

The same conclusions were reached by the Sixth Circuit in *Rambo* v. *United States,* 492 F. 2d 1060 (6 Cir. 1974). In anlayzing this issue the Sixth Circuit held at p. 1064:

> "Clearly the IRS has imposed a tax and just as clearly the taxpayer has denied that he owes that amount of money by refusing either to pay the imposed tax or to file a return. . . . The statute itself in no way limits the definition of a deficiency to a determination made only at the end of the taxable year."

In light of these authorities, the Respondent submits that it is obvious when IRS terminates a taxable year and imposes a tax an immediate deficiency is created.

The thrust of Petitioner's argument can be summarized by saying the Government has had to invent some incredible definitions in order to gerrymander the Code around to cover the improper actions of its agents and, therefore, the Government has been forced to present illogical and contorted arguments. When the arguments of the Government are compared with the highly analytical opinions of *Rambo* and *Clark,* it is clear the Government is grasping at straws.

II. WHEN A TAXABLE YEAR IS TERMINATED UNDER SECTION 6851 THE AUTHORITY FOR THE SECRETARY TO MAKE AN ASSESSMENT ORIGINATES IN SECTION 6861 AND THEREFORE THE PROCEDURAL SAFEGUARDS OF SECTION 6861 APPLY.

From the preceding argument it is obvious a deficiency is created when a taxable year is terminated under Section 6851, and therefore the procedural safeguards of Sections 6212 and 6213 apply. However, if this Court adopts the position of IRS on the issue of deficiency, the Petitioner still must hurdle the requirements of Section 6861 before it can prevail.

A. The Assessment Authority Under 6851 Does Not Originate in Section 6201.

When Mrs. Hall's taxable year was terminated the Government did not send her a deficiency notice. Failure of the Government to send the notice seems trivial and unimportant at first blush, but upon carefully examining the situation, the absence of a deficiency notice becomes of paramount importance because the taxpayer cannot litigate his claim in Tax Court until he receives the notice. 26 USC 6213(a); *Mason* v. *Commissioner of Internal Revenue,* 210 F. 2d 388 (5 Cir. 1954); *Corbett* v. *Frank,* 293 F. 2d 501 (9 Cir. 1961).

This places the taxpayer in a tenuous position because his right to petition tax court is dependent on circumstances entirely beyond his control.

In the case at bar, IRS terminated Mrs. Hall's taxable year under the authority of Section 6851. This section is titled "Termination of Taxable Year", and is found in Chapter 70, Subchapter A which is entitled "Jeopardy". The next succeeding section of Subchapter A is Section 6861 entitled, "Jeopardy Assessments of Income, Estate, Gift Taxes". Section 6861 authorizes the assessment of taxes, but it also contains a requirement that the Secretary send a deficiency notice within sixty (60) days after making the assessment if the jeopardy assessment is made before any notice is given to the taxpayer. The receipt of this notice would enable the taxpayer to petition the Tax Court for a determination of his tax liability, and while the case was pending IRS could not dispose of any of the taxpayer's assets (Section 6213).

In order to circumvent the requirements of Section 6861, the Government has devised some unique arguments. In *Schreck* v. *United States,* 301 F. Supp. 1265 (D. Md. 1969), IRS argued the power to assess taxes was inherent in Section 6851. When this argument failed IRS changed its legal theory and argued Section 6201 provided the authority to assess taxes when a taxable year was terminated under Section 6851. This argument was advanced by IRS in the case at bar, and in the case of *Irving* v. *Gray, supra,* 479 F. 2d 20 (2 Cir. 1973); *Rambo* v. *United States, supra,* 492 F. 2d 1060 (6 Cir. 1974); and *Clark* v. *Campbell, supra,* 501 F. 2d 108 (5 Cir. 1974).

In *Irving,* the Second Circuit adopted the Government's position and held at p. 24:

> "But Section 6201(a) is an alternative authorization for IRS assessment which requires no deficiency letter."

The opposite conclusion was reached by the Fifth Circuit in *Clark,* wherein the Court held at p. 121:

> "Section 6201 defines generally the authority to *assess uncontested taxes.* Where there is no contest (e.g. payment in accordance with the return) there is no great need for a prepayment forum." (Emphasis Added).

The Government's argument was also rejected by the Sixth Circuit in *Rambo.*

Even though IRS has changed its position on the issue of the origin of assessment authority, the Government has consistently maintained the assessment authority used in connection with Section 6851 does *not* originate in Section 6861. The reason for this consistency is because Section 6861 requires IRS to send a deficiency notice to the taxpayer if the jeopardy assessment is made before any notice has been given. If IRS does not send the notice the prohibitions of the Anti-Injunction Act are waived and the taxpayer can enjoin the collection of the tax. Thus, the Government has had to search for some alternative method of assessment that does not lie in Section 6861.

In the instant case, the Government has gone into extensive detail, tracing the history of 6201 (Petitioner's Brief pp. 27-46) and therefore, it would seem necessary to attack the history of the statute in order to rebut Petitioner's argument. However, such is not the

case. A simple reading of Section 6201 is enough to prove it was not intended to be used in jeopardy situations.

On page 20 of the Petitioner's Brief in the last paragraph the following quote is found:

> "The assessment authority is set forth in Section 6201, . . . which empowers the Commissioner 'to make the * * * assessments of all taxes * * *' without regard to whether a 'deficiency' exists."

Again on page page 23, Section 6201, is quoted as follows:

> "But only Section 6201 specifically provides that '(t)he Secretary or his delegate is authorized and required to make * * * assessments of all taxes * * *'."

In both quotes the Petitioner has omitted a critical phrase and is attempting to deceive the Court. The relevant portion of 6201 with the key phrase included provides:

> "The Secretary or his delegate is authorized and required to make the . . . assessments of all taxes . . . imposed by this title . . . which have not been fully paid *by stamp* at the time and the manner provided by law" (Emphasis Added).

Only by omitting the phrase "by stamp" can IRS argue Section 6201 provides assessment authority for jeopardy situations. At no time has any contention been made that this case is a Chapter 69 case dealing with taxes that are to be *paid by stamp*.

Paragraph (1) of Section 6201 deals with taxes shown on returns or lists. In the case at bar, no return was made and no argument has been presented that this case falls within Section 6021 which deals with "lists".

Paragraph (2) of 6201 deals with unpaid taxes by stamp and Subsection (3) deals with the erroneous income tax prepayment credits.

From this discussion it is clear that Section 6201 has nothing to do with jeopardy situations, and the Petitioner is attempting to bend Section 6201 to conform to its argument.

B. The Code Directs IRS to Chapter A for Special Rules Relating to Jeopardy Assessments.

If Section 6201 does not provide assessment authority for Section 6851, then where in the Code is the Secretary authorized to assess taxes when a taxable year is terminated pursuant to 6851? This answer can easily be found by reading Section 6201(d) which states:

> "For special rules applicable to deficiencies of income . . . taxes, see Subchapter B."

In turn Subchapter B, Section 6216(2) provides:

> "For procedures relating to jeopardy assessments, see Subchapter A of Chapter 70."

In order to avoid the consequences of these explicit directions from Congress, Petitioner cites Section 7806(A)(B) which in essence states that no legal sig-

nifiance should be given to the location of the grouping of the various sections or to cross-reference tables or to any table of contents. (Petitioners Brief p. 42)

Despite the provisions of Section 7806 the unavoidable conclusion is Congress specifically directed us to a Code Section other than 6201 for the rules relating to deficiencies and jeopardy assessments.

If Congress believed Section 6201 was applicable to deficiencies, short year terminations, and jeopardy, there would have been no need to direct us to another section of the Code.

To conclude otherwise would be like opening the sports page and reading an article about the Notre Dame-Alabama football game, and then finding a statement at the end that reads: "For a run-down on the USC-Ohio State game see page 3."

When we see an editorial notation like this should we conclude the information about the USC-Ohio State game is on page 3, or should we assume somehow the information was magically contained in the article we just finished reading? The inescapable conclusion is that we had better look at page 3. Likewise, when we are reading the Code and we find an editorial notation directing us to another section for the special rules relating to deficiency and jeopardy, common sense dictates that we must look to these sections.

C. Section 6861 is Not Limited to Year End Situations.

Another argument advanced by the government is that section 6861 can be invoked only at the date on which the taxes for the full taxable year due is payable i.e. April 15 of the following year (Petitioners Brief page 22). However, this conclusion is not supported by the language of Section 6861 because nowhere in that Section does it state these powers are applicable only after the date on which taxes for the full taxable year are due.

D. The Historical Analysis Indicates Section 6861 May Have Been the Section Congress Intended for Use in Exigent Situations.

The Government argues Section 6851 was designed for more exigent situations than Section 6861 (Petitioner's Brief, p. 21). In order to support this contention, Petitioner cites the Revenue Act of 1921 and argues that the predecessor to Section 6861 [250(d)] contained a provision for an administrative appeal, but the predecessor to 6851 [205(g)] did not allow an appeal. Therefore, Petitioner concludes that Section 205(g) was to be used in more exigent circumstances than Section 205(d).

However, there is evidence that Congress had envisioned much more than an administrative appeal under Section 205(g). A portion of that Section not cited by the Petitioner states:

> "In *any action or suit* brought to enforce payment on taxes made due and payable by virtue of

> the provisions of this subsection, the findings of the Commissioner made as herein provided, whether made after notice of the taxpayer or not shall be for all purposes *presumptive evidence* of the taxpayer's design" [Revenue Act of 1921, 205(g), Petitioner's Brief, p. 72]. (Emphasis added.)

This language has been carried forward in Section 6851 of the Revenue Code of 1954, which provides:

> "In *any proceeding in Court* brought to enforce payment of taxes made due and payable by virtue of the provisions of this section the findings of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy" [Petitioner's Brief, p. 61]. (Emphasis added.)

From these provisions it is reasonable to conclude that Congress intended for IRS to immediately file suit when it appeared the taxpayer was doing something that would make the collection of taxes ineffective. The filing of this suit would of course allow the taxpayer his day in Court and would afford him the opportunity to present evidence to overcome the presumption that runs in favor of the Secretary.

If Congress had intended to authorize IRS to levy on the taxpayer's property without a hearing, why would Congress have gone to the trouble of making the Secretary's findings presumptive evidence of jeopardy? If the Secretary was going to collect the taxes

through any means other than litigation he would not need the benefit of this presumption.

By examining the predecessor to 6861 [205(d)], we find Congress empowered the Commissioner to disregard the administrative appeal procedure in certain cases where:

> ". . . the Commissioner believes that the collection of the amount due would be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing" [Revenue Act of 1921, Section 250(d)] [Petitioner's Brief, p. 71].

A similar provision for emergency situations is contained in Section 6861 of the 1954 Code. Section 6212 requires the Secretary to send a deficiency notice when he determines there is a deficiency in respect to any tax imposed by Subtitle A (Income Taxes). Section 6213 prevents the Government from making any assessments until 90 days after the notice is sent. This 90 day grace period is allowed so the taxpayer can file a petition in Tax Court for redetermination of the deficiency.

According to Section 6213, the rule against making any assessments applies to all cases "except as provided in Section 6861," which empowers the Secretary to make assessments and to collect deficiencies without giving notice to the taxpayer. However, if the Secretary acts before any notice has been given under Section 6212(a), the Secretary must mail notice to the taxpayer within sixty (60) days *after* making the assessment. In other words, Section 6861 envisions a

situation where the advance notice requirement of Section 6212 can be waived. Obviously, this affords IRS an opportunity to immediately assess taxes; conversely from the language of Section 6851 it appears that a suit must be filed in order to effect collection.

The Respondent concedes it is impossible to know beyond any doubt what Congress intended. The meaning of these Sections are buried with the men who wrote them and we must now carefully sort and study their work in order to guess what was in their minds at the time these Sections were written. In so doing, the Respondent contends that her interpretation of the Code is more logical and reasonable than the interpretation of the Government.

III. NOTWITHSTANDING THE PROVISIONS OF THE CODE, IT WAS UNCONSTITUTIONAL FOR IRS TO TAKE MRS. HALL'S ASSETS.

Even if the Government is correct in its interpretation of the Code: that Section 6851 stands alone; that Section 6201(a) can be used to assess taxes against a short year taxpayer; that Section 6331 can be used to immediately levy upon and seize property without first complying with the deficiency procedures of Section 6861, such action violates the due process clause of the Fifth Amendment.

A study of the Code offers legal scholars the opportunity to debate the esoteric meaning of a very complex Code. However, the issues in this case transcend codal arguments.

In *Rambo* v. *United States, supra,* 492 F. 2d 1060 (6 Cir. 1974), Rambo admitted he was the conduit for the passage of chemical compounds used in the manufacture of illegal drugs. He had $12,661.25 in his bank account, $2,200.00 in cash, three automobiles, and at the time of his arrest he was in possession of enough tranquilizers to fill a briefcase.

In *Laing* v. *United States, supra,* 496 F. 2d 853 (D.Vt. 1973), the taxpayer was a resident of New Zealand, and had entered the United States on a B2 Visa. When he attempted to leave the United States and to enter Canada the Candian officials refused him entry and when he returned to the United States, the Custom Officials found a suitcase containing $310,000.00 in the engine compartment of his automobile.

In *Irving* v. *Gray, supra,* 479 F. 2d 20 (2 Cir. 1973), the taxpayer was a resident of Ibiza and when his involvement in the Howard Hughes hoax was discovered the Internal Revenue knew that Irving had obtained $650,000.00 from McGraw-Hill Publishing Company and that Merrill-Lynch was holding certain funds on his behalf.

While the Respondent believes that IRS was wrong in each of the above cases, defense of these taxpayers must be left to other attorneys.

In the case at bar, Mrs. Hall was not trafficking in illegal drugs, she was not a resident of another country, she had not received any large sum of money, and she was not trying to leave the Country. Instead, she was residing quietly at her home in Shelby County, Kentucky when agents from IRS fell upon her and pre-

sented a tax bill that exceeded her total assets by more than ten times.

In order for Mrs. Hall to owe $52,680.25 in taxes, she would have had to earn more than $100,000.00 during the thirty (30) day period that was terminated. If she earned this money, what happened to it? She obviously did not spend it on houses and cars because she lived very modestly in a rented home and she had one 1970 Volkswagen. The police thoroughly searched her house then IRS attached her bank account and safety deposit box yet no one found the missing $100,000.00. The fact the money did not appear surprised no one, including IRS, because the Service was not interested in collecting taxes, instead it was interested in harassing Mrs. Hall pursuant to the Presidential Directive (p. 1, Appendix this Brief). If Mrs. Hall had been sent a deficiency notice, she would have petitioned Tax Court and the case would have been over, but IRS did not want a speedy determination of the tax issue; instead, IRS wanted to destroy Mrs. Hall through the use of its insidious power in complete disregard to concepts of due process.

After all of Mrs. Hall's assets had been sold it logically follows that if she continued to work, IRS would have summarily attached her paycheck and left her penniless. She was trapped in a web of bureaucratic zeal and it does not take much imagination to see that she would have soon been on the welfare rolls if IRS had not been stopped by the District Court Injunction.

Notwithstanding the holding of *Irving* v. *Gray*, *supra*, 479 F. 2d 20 (2 Cir. 1973), Mrs. Hall had no

recourse except to file suit and request an injunction. The Government had deliberately closed the door to Tax Court by not sending her a deficiency notice, and the other remedies suggested by the *Irving* Court were simply of no value to Mrs. Hall. In *Lisner* v. *McCanless*, 356 F. Supp. 398 (D. Ariz. 1973), the Court considered issues very similar to the issues in the case at bar and concluded at p. 402:

> "Jeopardy cases are either a part of this general scheme, or they represent yet a third category of assessment in which all the rules are waived. The government of course prefers the latter interpretation and would have the Court rely on the absolute power of the sovereign to collect taxes in such a manner. The point is that it is doubtful that Congress intended that effect on its code structure."

The *Lisner* Court further held at p. 406:

> ". . . To imagine that Congress, which enacted these two sections under the general title 'Subchapter A—Jeopardy,' intended the sections to be used as 'wild cards' without reference to its carefully constructed collection scheme, is to ignore plain english."

Following *Lisner*, the Fifth Circuit in *Clark* v. *Campbell*, *supra*, 501 F. 2d 108 (5 Cir. 1974) criticized the suggestion that the taxpayer could post a bond to stay collection proceedings and held at p. 123:

> "Despite our vantage so far removed from the real world of business we know enough of the economic facts of life to recognize that a jeopardy

taxpayer will find it difficult, if not impossible, to obtain a bond once all of his assets have been placed beyond his control."

Finally, the Fifth Circuit in *Clark* held at p. 126:

> "We fail to see how any legitimate government interest will be prejudiced by construing the law to permit the § 6851 quick termination taxpayer to seek a redetermination in the Tax Court before his assets are involuntarily applied to the liability. The opportunity for prompt review will hardly dry up the sources of revenue or stop the Government in its tracks since virtually all other taxpayers (§ 6861 jeopardy or otherwise) who desire to contest income tax liability prior to payment are currently allowed to do so."

In addition to the criticism offered by these Courts, the Sixth Circuit in *Rambo* v. *United States, supra,* 492 F. 2d 1060 (6 Cir. 1974) aptly stated:

> "A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law" (p. 1065).

In considering the issue of seizing a citizen's property without a prior judicial hearing, this Court in *Sniadach* v. *Family Finance Corporation,* 395 U. S. 337 (1969) and *Fuentes* v. *Shevin,* 407 U. S. 67 (1972) acknowledged that if property was taken without notice and a hearing, the taking would violate the due process provisions of the Constitution. In *Fuentes* this Court held:

> "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.
>
> "[5] If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place" (pp. 81-82).

However, this Court in *Fuentes* recognized "there are extraordinary situations that justify postponing notice and opportunity for a hearing" (*Fuentes* p. 90). These situations all involve " an important governmental or general public interest," coupled with "a special need for very prompt action" (*Fuentes* p. 92). To support this proposition, this Court cited *Phillips* v. *Commissioner,* 238 U. S. 589 (1931). In *Phillips* the taxpayer contended the procedure used by IRS violated the Constitution because it did not provide for a judicial determination *before* the assessment was made. However, this Court rejected that argument and held the taxpayer had adequate legal remedies:

> ". . . the transferee may avail himself of the provisions for immediate redetermination *of the*

liability by the Board of Tax Appeals since all provisions governing this mode of review are made applicable by §280." (P. 598) (Emphasis Added)

Unlike Mrs. Hall the taxpayer in the *Phillips* case had assets in excess of the amount assessed. Furthermore, in the case at bar Mrs. Hall has only asked that she be given the same consideration that the taxpayer was given in the *Phillips* case i.e., a prompt review of her tax liabilities by the Tax Court.

Although this Court decided for the Government in the *Phillips* case it was quite obvious that Phillips had been afforded an opportunity to challenge the validity of the tax assessment.

Respondent concedes that it is vitally important for the Government to collect its taxes but Respondent respectfully submits that if the Government sets out on a deliberate course to destroy a citizen, the Internal Revenue Service has over-reached and should be stopped.

In the case at bar Mrs. Hall was denied the right to promptly litigate her claim in Tax Court, and her other remedies were illusionary. Therefore the conduct of IRS violated her due process rights under the Fifth Amendment.

CONCLUSION

IRS has the power to assess taxes against a citizen in *any* amount. The Service can literally pick a figure out of the air and demand payment. If the taxpayer cannot meet the demand, the Service can seize and sell the taxpayer's property without giving him the opportunity to be heard in Court. A citizen can be forced into indigency on the whim of a Regional Director of IRS. Irreplaceable family heirlooms can be taken and sold. No one would be safe from the potential tyranny of IRS. Surely Congress intended no such result.

Respondent finds little comfort in Petitioner's statement that this procedure is "used sparingly" (Petitioner's Brief p. 19). Once the precedent is established the scope of the IRS operation is unlimited. What happens if the next President decides that those who oppose his economic policy should be turned over to IRS?

In *Clark* v. *Campbell, supra,* 501 F. 2d 108 Chief Judge John R. Brown noted this weapon in the arsenal of IRS had "atomic potentialities" (*Clark* p. 110).

In the name of liberty, this Court should stop IRS in its tracks and for the reasons stated affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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January, 1975

ACKNOWLEDGMENT

I wish to thank my trusty Law Clerk, Jamie McLaughlin Fish, and my dependable Secretary, Crafty Kapfhammer, for their help in the writing of this Brief. They are both smarter than I am, they work harder than I do, and they do not receive any credit for their enormous work.

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APPENDIX

See Am. 162

516-95
420-282, 526-81, 5(11)G-33.
5(17)G-48, 930-12

manual
supplement

US Treasury Department Internal Revenue Service

(The Part V coding of this Supplement refers to IRM Part V)

March 24, 1972

IRS Narcotics Project - Collection and Taxpayer Service Division Participation

Section 1. Purpose

.01 This Supplement provides for Collection and Taxpayer Service participation in the national Internal Revenue Service Narcotics Project, established by Manual Supplement 930-108, CRs 420-267, 516-77, 710-37 and 940-46, dated August 30, 1971, which was reissued in November 1971 with CR 5(17)G-15 added.

.02 This Supplement sets forth the procedures and reporting requirements to be observed with regard to TDA's, TDI's, Other Investigations, and Miscellaneous Investigations identified as being within the province of the IRS Narcotics Project. It also establishes a Narcotics Project Manager (Collection) in the National Office.

Section 2. Background

.01 President Nixon, on June 17, 1971, announced the Administration's expanded effort to combat the menace of drug abuse. Included in the Presidential message is this high priority project to conduct systematic tax investigations of middle and upper echelon narcotics traffickers. The objective of this project is to disrupt the distribution of narcotics by increasing the efforts of the Service in prosecuting those narcotic traffickers who have committed criminal tax violations and to drastically reduce the income flow in this illicit activity by vigorously assessing and collecting tax and penalties on income from that source which has not been reported.

.02 This project is under the general supervision of the Assistant Commissioner (Compliance). Primary responsibility for administering the project is charged to the Directors, Audit and Intelligence. All Audit and Intelligence field personnel assigned to this project are under line supervision of District Audit and Intelligence Division Chiefs, who, in matters relating to this project, will be directly controlled and supervised by the National Office. This control and supervision will be exercised through the Narcotics Project Managers (Audit) and (Intelligence) in the National Office.

.03 Target cases will be selected by a target selection committee comprised of the Director, Office of Law Enforcement, Department of the Treasury, as Chairman and one member each from the Intelligence and Audit Divisions, the Bureau of Customs and the Bureau of Narcotics and Dangerous Drugs.

.04 Special Agents and Revenue Agents assigned to this project work exclusively on this project.

Section 3. Responsibilities of National Narcotics Project Manager (Collection)

.01 The Narcotics Project Manager (Collection) is responsible for the overall Collection and Taxpayer Service Division participation in the Narcotics Project. He is the representative of the Director, Collection Division, National Office, in narcotics matters and will keep the Director fully informed as to progress requirements and accomplishments at all times. The Chief, Delinquent Returns Branch, will be the Project Manager (Collection).

.02 The Narcotics Project Manager (Collection) is responsible for all liaison functions between the Collection Division and the Audit and Intelligence Divisions.

.03 The Narcotics Project Manager (Collection) duties will include (but are not limited to) the following:

Distribution:
IRM 4200, 5100, 5200, 5(11)00, 5(17)00-100, 5(17)00-200, 5(17)00-(11)00 and 9300

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Attachment to MS 490-200, CR 520-82, 5(12)G-10 and 930-121

Pattern Letter P-49 (Rev. 4-72)

(Type on Appropriate Letterhead)

NOTICE OF TERMINATION OF TAXABLE PERIOD

Pursuant to section 6851 of the Internal Revenue Code, you are notified that I have found you (insert statutory reason for termination of taxable period) thereby tending to prejudice or render ineffectual collection of income tax for the period _____. Accordingly, I have declared the taxable period of _____ terminated; and, consequently, the income tax for the terminated period has become immediately due and payable.

Demand is hereby made for the tax for the terminated period in the following amount.

Taxable Period	Tax	Penalty

Any portion of the tax for the terminated period which is unpaid shall be assessed against you, and administrative or judicial action to collect the assessment shall be taken immediately.

Under section 443 of the Internal Revenue Code you are required to file a return for your terminated taxable period. Such termination and filing does not relieve you of the responsibility for filing a return for your usual annual accounting period under section 6012 of the Code. Any amount collected as a result of termination of the period will be applied against any assessment which may be made for the terminated period and credited against the tax finally determined to be due on your annual return.

Very truly yours,

District Director

see

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